82-1185

No. 82-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD E. MUIR, JEFF BUTTRAM, and O. NAVARRO FAIRCLOTH,

Petitioners,

—v.—

ALABAMA EDUCATIONAL TELEVISION COMMISSION; JACOB WALKER, JERRI MCLAIN, BERTHA S. ROBERTS, THOMAS T. MARTIN, HELEN SHORES LEE, individually and in their capacities as members of the ALABAMA EDUCATIONAL TELEVISION COMMISSION; EDWARD WEGENER, individually and as General Manager of the COMMISSION,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Do the executives of a state-operated public television station abridge viewers' First Amendment rights by cancelling a scheduled program because its subject matter is controversial?

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OPINIONS BELOW

The decision of the District Court is unreported (see Appendix at 210). The panel decision of the Court of Appeals is reported at 656 F.2d 1012, and the en banc opinion is at 688 F.2d 1033. They are reproduced respectively at 130 and 1 in the Appendix, infra.

JURISDICTION

The judgment below was entered on October 15, 1982 by the en banc court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

Constitution of the United States, Amendment I: "Congress shall make no law *** abridging the freedom of speech, or of the press ***."

Amendment 14, Section 1: "*** No state shall *** deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Factual Background

This case involves the decision of a state-owned television station to remove from its schedule the program "Death of a Princess" because of political objections to its content.

"Death of a Princess" was produced by WGBH, Boston, and ATV, London, England,[1] and is a dramatized account of

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1. WGBH is a public television station and produces numerous series, including "Masterpiece Theatre"; ATV is one of the independent television broadcasters operating non-government television in Britain. "Death of a Princess" is part of a series entitled "World" which included a variety of sociological studies of other cultures.

the author's efforts to discover the truth about the execution for adultery of a Saudi princess. Every person he interviews has a different "true story." From the sum of these parts, the audience learns about the culture, traditions, and forces of change in Middle Eastern society -- especially as they involve the role of women. The Saudi government objected to the United States government regarding the program.[2] Acting Secretary of State Warren Christopher wrote to the Public Broadcasting Service (PBS), the program distributor, asking it to consider the Saudi government's objections to the program and to present "a full and balanced presentation." The letter did not warn

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2. The film mentions only "Arabia," not Saudi Arabia, but was based on an incident in Saudi Arabia. Similar protests had been lodged with the United Kingdom when the program had been scheduled for viewing and shown in that nation approximately a month earlier.

of any physical danger to Americans. PBS telexed a copy of the letter, along with an announcement that it would add a 30-minute discussion program following the broadcast, to all member stations before AETC made its decision not to broadcast.

The Alabama Educational Television Commission[3] operates nine state-owned public television stations as a network, showing generally the same programming simultaneously on all nine stations. AETC had purchased and was contractually free

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3. AETC is organized under Ala. Code §§ 16-17=1 et seq. and is responsible for "making the benefits of educational television available and promoting its use by inhabitants of Alabama". AETC has "the duty of controlling and supervising the use of channels reserved by the federal communications commission to Alabama for non-commercial, educational use." The five members are appointed by the governor with the advice and consent of the state senate. Unlike the professional broadcast staff, the members of the Commission are political appointees.

to broadcast "Death of a Princess" at any time on or after 8:00 p.m. CDT on May 12, 1980 (the national airing time).

On May 9, Edward Wegener, the general manager of the AETC, was informed by program manager Henry Bonner that the Commission had received a great many calls concerning the playing of "Death of a Princess." Bonner specifically mentioned that a representative of the Birmingham Area Chamber of Commerce and William Harbert of Harbert Construction Company had come by or called, objecting to the film.[4] Wegener called Jacob Walker, Chairman of the AETC, who set up a conference call with the other commissioners and Wegener later in the day. Although none of the Commissioners had viewed the film at that time, they decided not to broadcast the previously scheduled film because of their

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4. Harbert Company is a Birmingham-based firm which has construction contracts in Saudi Arabia and the Middle East.

alleged concern "for the safety and well-being of several hundred Alabamians who were working in the Mideast."

On Saturday morning, May 10, Wegener talked to Walker who told him that the final Commission decision was that the film should not be shown. At the time of his deposition, the only facts that Wegener could remember any commissioner citing for the decision were Walker's recounting of a conversation he had with Harbert.

Although the AETC has no written regulations on who makes programming decisions such as this one, programming authority had been exercised solely by the programming staff, the program manager and the general manager in the past. Since he had become the manager three months earlier, Wegener had deleted a program only once and had done so without informing the commissioners. This was the first time that the Commission, as

opposed to the professional staff, had ever made a decision to remove a scheduled program.

The Legal Background

The petitioners filed this action seeking damages, a temporary restraining order, and preliminary and permanent injunctions against defendants' refusal to broadcast the program "Death of a Princess."[5] The District Court denied the temporary restraining order and set the preliminary injunction for hearing without oral evidence being allowed. By agreement, the petitioners took the deposition of respondent Wegener, the general manager of the Commission. The petitioners presented other evidence, primarily gleaned from documents discovered from the AETC.

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5. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Before the hearing, the defendants filed a motion for summary judgment based on the same evidence they had presented in connection with the preliminary injunction. The district court denied the preliminary injunction and granted summary judgment for the defendants. The district court held that the AETC was protected by the First Amendment despite its governmental status.

On appeal a panel of the Fifth Circuit held, with one dissent, that the decision of the AETC was protected by the First Amendment because the Commission was not acting as a propaganda arm of the State of Alabama, 656 F.2d 1012 (5th Cir. 1981).

The present case and a similar action from Texas were jointly reheard en banc

by the former Fifth Circuit.[6] Eleven of the 22 participating members of the Court joined one opinion (the Hill opinion), while another four concurred in the result with different reasoning (the Rubin opinion). Judge Garwood joined in the Hill opinion, but wrote a concurring opinion, in which the Rubin opinion joined. There were three dissenting opinions written by Judges Kravitch, Frank M. Johnson (joined by four others), and Reavley.

A. The Hill Opinion.

The Hill opinion of the en banc court turned on several critical assumptions:

(1) The government is free to express its own views in the marketplace

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7. The Texas case, Barnstone v. University of Houston, is also pending before this Court on a petition for certiorari.

of ideas. This government expression is neither protected nor regulated by the First Amendment. 688 F.2d at 1038.

(2) The various broadcasting regulatory acts require a state-owned broadcaster to exercise editorial control. 688 F.2d at 1041. Private parties may protest the misuse of editorial control to the Federal Communications Commission. 688 F.2d at 1047-48, but not to the courts.

(3) State-owned television stations are not public forums because the station has the statutory right to exercise "sole programming authority." 688 F.2d at 1041-3.

(4) There was no censorship of "Death of a Princess" by either the Texas station or the Alabama network because the state was exercising "editorial discretion over its own expression." 688 F.2d 1043-7.

B. The Rubin Opinion.

The Rubin opinion is primarily based on the rejection of a government television station as a "public forum."

> The function of a state agency operating an informational medium is significant in determining first amendment restrictions on its actions. *** In those activities that, like television broadcasting to the general public, depend in part on audience interest, appraisal of audience interest and suitability for publication on broadcast inevitably involves judgment of contents.

688 F.2d at 1050. This rationale overlooks the fact that AETC never claimed it took "Death of a Princess" off because it would be unpopular among its potential Alabamian viewing audience, but rather because it would anger the Saudi royal family.

The Rubin opinion concludes that there exists no cause of action unless the "station has a policy of curtailing access to ideas" and that "judicial

intervention does not appear required or warranted for a single programming decision." 688 F.2d at 1053.[7] The Rubin opinion would, thus, require proof of a pattern or practice of discrimination.

Under either the Hill or the Rubin opinion, however, the result is clear: a state-owned television station may exercise its unfettered discretion in choosing and excluding programs on the basis of their political content, subject only to the potential control of the Federal Communications Commission.[8]

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7. Judge Garwood appears to join this holding. See 688 F.2d 1061-2.

8. The Hill opinion held that viewers could seek relief from the Federal Communications Commission, 688 F.2d at 1047-48. Thus the FCC is the sole body with authority to enforce the First Amendment, according to the circuit court. But the precise power of the F.C.C. over public broadcasting is itself unclear. Accuracy in Media, Inc. v. F.C.C., 521 F.2d 288 (D.C. Cir. 1975).

C. The Johnson Dissent.

Judge Johnson's dissent recognized the importance of preserving a high degree of editorial independence to state-owned broadcasters. He rejected, however, the implicit assumption of both the Hill and Rubin opinions that the only way to preserve a state-owned broadcaster's editorial independence was to tolerate the use of overtly political criteria in the choice of programming. Instead, the Johnson dissent argues that state-owned broadcast facilities are forbidden by the First Amendment from using overtly political criteria in exercising their editorial discretion. The Johnson dissent would require a plaintiff to prove that a given programming decision had been motivated by political factors. Once such a burden had been satisfied, a broadcaster would, nevertheless, be permitted to demonstrate that the editorial decision

at issue would have been made even in the absence of the program's political content. See generally Board of Education v. Pico, supra; Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977). The Johnson dissent would require an evidentiary hearing in the trial court.

REASON FOR GRANTING THE WRIT

All parties agree that public television must not be permitted to degenerate into a state propaganda arm. Unfortunately, the decision of the en banc majority below inadvertently removes any meaningful legal constraint on the politicization of state-owned broadcasting media. Unless overturned, it constitutes an open invitation to politically motivated programming decisions.

This Court has repeatedly ruled that the First Amendment forbids government from using its power to favor one

political idea over another on the basis of content. E.g. Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Elrod v. Burns, 427 U.S. 347 (1976); Board of Education v. Pico, ___ U.S. ___, 73 L.Ed.2d 435 (1982). Ordinarily, of course, the First Amendment acts to protect private speakers against censorship imposed by the government. E.g., New York Times v. United States, 403 U.S. 713 (1971). Where, as in the case of a state owned television station, the "speaker" is itself an organ of the government, the First Amendment similarly forbids the use of overtly political criteria in determining whether to cancel an otherwise desirable program.

I. STATE OWNED BROADCASTERS MAY NOT CANCEL A PREVIOUSLY SCHEDULED PROGRAM SOLELY BECAUSE OF ITS POLITICAL CONTENT

The crux of the en banc majority's decision below was that state-owned and privately-owned television stations enjoy equivalent discretion in deciding what to broadcast. Since, reasoned the en banc majority, a privately-owned television station would enjoy substantial First Amendment protection in deciding whether to broadcast "Death of a Princess", a similarly broad discretion must shield the State of Alabama's decision to cancel the program because it offended the Saudi royal family. Such an approach wholly ignores the fundamental distinction between private activity, which enjoys constitutional protection from governmental interference, and state action, which is directly regulated by the Constitution. Compare Memphis Light, Gas &

Water Div. v. Craft, 436 U.S. 1 (1978) with Jackson v. Metropolitan Edison Co., 419 U.S. 545 (1974). See also Bivens v. Six Unknown Agents, 403 U.S. 388, 391-92 (1971). Unlike privately-owned media, which are free, and even encouraged, under the First Amendment to favor the political views of their respective owners,[9] state-owned television stations do not exist to serve as propaganda arms of the political majority.[10]

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9. E.g. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973); but see Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969).

10. The prohibition on state owned television serving as a state propaganda arm flows both from the First Amendment and from state and federal statutes designed to insulate public broadcasters from political pressure. See generally Network Project v. Corporation for Public Broadcasting, 561 F.2d 463 (1977); Accuracy in Media, Inc. v. F.C.C., 521 F.2d 288 (D.C. Cir. 1975). See Chase, Public Broadcast-

(footnote continued on following page)

Thus, unlike their privately-owned counterparts, state owned and operated broadcasters may not permit the controversial political content of a program to play a determinative role in deciding whether to broadcast it. Where, as here, political appointees of the State of Alabama bowed to local pressure and overruled the editorial judgment of a professional broadcast staff by ordering the cancellation of a previously scheduled program solely because of its political content, Alabama misused its state-owned television station as a political instrument. By upholding such an act of political censorship, the opinion below poses a direct threat to the independence of

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(footnote continued from preceding page) ing and the Problem of Government Influence: Towards a Legislative Solution, 9 U.Mich.J. L.Ref. 62 (1975); Carnegie Commission on Educational Television, Public Television, A Program for Action (1967).

state-owned broadcast media and invites government officials to pick and choose what is to be broadcast on the basis of overtly political criteria.

II. MANAGEABLE JUDICIAL STANDARDS EXIST TO DIFFERENTIATE THE EXERCISE OF LEGITIMATE EDITORIAL DISCRETION FROM UNCONSTITUTIONAL POLITICAL CENSORSHIP

The willingness of the en banc majority below to tolerate the political censorship inherent in the cancellation of "Death of a Princess" flowed, in large part, from an understandable desire to preserve a broad degree of editorial discretion in public broadcasters. Thus, the majority noted:

> When state officials operate a public television station, they must necessarily make discriminating choices .... In exercising their editorial discretion state officials will unavoidably make programming decisions which can be characterized as "politically motivated."

688 F.2d at 1044. See also 688 F.2d at 1050.

In seeking to preserve maximum editorial discretion to public broadcasters, the court below was unquestionably correct. However, by validating political interference in the programming process, the decision below inadvertently weakened the editorial independence of state-owned public broadcasters by inviting political appointees to countermand controversial programming decisions.[11]

It is unnecessary to tolerate a counterproductive degree of political censorship in order to preserve legitimate editorial discretion. This Court

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11. The lack of any procedures governing the cancellation of a program is a virtual invitation to political abuse. For example, when the Alabama Educational Television Commission acted to cancel "Death of a Princess", not a single member of the Commission had ever viewed the show. Cancelling a show without looking at it is hardly conducive to the exercise of legitimate editorial discretion.

has enunciated manageable judicial standards which permit government to exercise broad discretion without tolerating political censorship. For example, in Board of Education v. Pico, ___ U.S. ___, 73 L.Ed.2d 435 (1982), all parties conceded that school boards must be free to exercise substantial discretion in the selection and retention of school library materials. Nevertheless, this Court recognized that such discretion was cabined by the First Amendment and could not include politically motivated attempts at censorship. Similarly, in Elrod v. Burns, 427 U.S. 347 (1976), Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977), and Branti v. Finkel, 455 U.S. 507 (1980), this Court recognized that government employers must be permitted a wide degree of latitude in evaluating public employees. Nevertheless, this Court firmly ruled that employment discretion did not

extend to political favoritism. In Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), this Court agreed that the managers of a city auditorium must, of necessity, exercise broad discretion in allocating access to its facilities. Nevertheless, this Court refused to tolerate the exercise of such discretion on political grounds. See also City of Madison Joint School District v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976). The lesson of Pico, Elrod, Mt. Healthy and Southeastern Promotions is that no organ of the state has discretion to violate the First Amendment.

Thus, the presence of editorial discretion in decision-making should not deter courts from enforcing the First Amendment in the context of government-owned television, just as courts have enforced First Amendment guarantees in

other discretion-laden contexts. Television censorship cases present similar issues to those raised in public employment-First Amendment cases and may be decided by using the burdens and order of proof described in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

First, the plaintiff must show that the program's political content was a substantial or motivating factor in the decision not to broadcast.[12]

Second, the court would then balance the competing constitutional interests of

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12. This standard would apply whether the broadcaster had rejected the program in the initial selection process or had, as in this case, scheduled the program and later removed it. As a practical matter, initial selection cases will be harder to prove because such decisions are less public and more routine than the extraordinary situation of the Commission making an individual programming decision, as in this case. As here, a deviation from ordinary procedures would raise a strong inference that politics played a role in the editorial process.

the parties. Pickering v. Board of Education, 391 U.S. 563 (1968). If a plaintiff satisfies the initial persuasion burden established in step one, factors to be balanced include the public's right to see and hear the program on the one hand and the state broadcaster's right to choose its own schedule on the other. Only a desire to present a balanced presentation of all sides of an issue would tip the balance in favor of exclusion on the basis of political content. The broadcaster could also prevail on exclusion by showing the proposed program to be in a category which has been held to have no constitutional protection: e.g., false, defamatory, or obscene material. Finally, there is the remote possibility that the program ideas could be banned on the grounds that they would create imminent

public danger.[13]

Third, if the balance favors the viewer, the burden would shift to the broadcaster to show that it would have made the same decision even if it had applied politically non-discriminatory rules of programming.[14] At this stage, the broadcaster may show that its normal programming practice or policy would have resulted in the same

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13. See, e.g., Schenck v. United States, 249 U.S. 47 (1919); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Gooding v. Wilson, 405 U.S. 518 (1972); Brandenburg v. Ohio, 395 U.S. 444 (1969); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968).

14. This does not amount to a "right of access" or a finding that a state-owned television network is a "public forum." The Mt. Healthy analysis has usually been applied when there was no public forum and the government had some countervailing interest beyond "time, place and manner" regulations. Petitioners do not assert either a right of access to state-owned public television or that public television is a public forum. Petitioner seek only to be free from political censorship in the selection of programs on state-owned broadcasting media.

decision based on factors other than the political impact of the program, i.e., on technical quality, format, style, and the like.

Since the proposed standard recognizes the legitimate editorial function and discretion of the AETC and requires an aggrieved party to satisfy a difficult persuasion burden, there should be no fear that courts would assume general supervision over television stations. Moreover, the test can be applied, as it has been, to damage as well as injunctive actions.

CONCLUSION

For the reasons set forth in this petition, the petitioners pray that the Court will grant a writ of certiorari to review and reverse the decisions below.

Respectfully submitted,

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